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IN THE

Supreme Court of the United States

October Term, 1956
No. 5.

RAPHAEL KONIGSBERG,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA and the COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.

Statement of Material Facts.

Respondent has set forth in its statement of material facts isolated portions of articles written by Petitioner in The California Eagle. Each of the articles contains commentaries on the political, economic and social events of the day. Respondent, however, fails to call to the attention of the Court the one article written directly to the issue which Respondent calls "the area of doubt".

This is an article titled "Force and Violence". [R. 172-174.] It was written before the issues in this proceeding arose and cannot under any circumstances be deemed to be self-serving.

In this article [R. 173], Petitioner said:

> "It is vehemently asserted that advocacy of force and violence is a danger to the American Government and that its proponents should be punished. With this I agree. Such advocacy is unAmerican and does undermine our democratic processes. Those who preach it must be punished."

Thus Petitioner's personal declaration under oath that "I can say very definitely I did not, I don't; I never would advocate the overthrow of the government by force or violence clearly and unequivocally . . ." [R. 29], is reenforced by his written expressions from the very sources introduced by Respondent against him.

II.

Jurisdictional Points.

A. Petitioner Properly Raised Constitutional Questions at Every Stage of Proceedings Including the Briefs Before the California Supreme Court.

Respondent suggests that Petitioner failed to assert his constitutional grounds adequately and/or with sufficient frequency in his brief before the California Supreme Court. [R. 18-24.][1]

While the basic legal principles asserted by Respondent may be correct, the facts in this case do not fall within the purview of the law advanced by Respondent.

First of all, the cases cited by Respondent are almost exclusively cases dealing with appellate problems and appellate procedures. It is true that the California Supreme

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[1]We shall not repeat here the detailed analysis of the Record and briefs relating to this point appearing in Petitioner's Opening Brief, pages 18-22.

Court is primarily a court of appellate jurisdiction; however, in the instant case, the matter came before the Supreme Court of California not on the basis of *appellate* jurisdiction but on the basis of *original* jurisdiction.

Rule 59(b) of the Rules on Appeal of the California Supreme Court (Pet. Op. Br. p. 6) points out that where a Petitioner seeks to review any action of the Committee of Bar Examiners, he must file a petition in the Supreme Court. The petition "shall be verified, shall specify the grounds relied on and shall be accompanied by Petitioner's brief and proof of service on the Board of Governors. . . ." In the instant case, Petitioner filed the jurisdictional document required by Rule 59(b)—the Petition—and this document is set forth in full on pages 1 to 4 of the Transcript of Record before this Court.

This jurisdictional document specifically enumerates the constitutional grounds relied on by the Petitioner. These grounds include:

> "9. That the denial of the application of the Petitioner violates the rights of Petitioner under the First Amendment to the Constitution of the United States.
>
> "10. That the denial of the application violates the Fifth Amendment to the Constitution of the United States in that it deprives Petitioner of liberty or property without due process of law.
>
> "11. That said denial violates the Fourteenth Amendment to the Constitution in that it is an attempt by the State of California to deprive Petitioner of liberty or property without due process of law and denied Petitioner the equal protection of the law."

Thus, Petitioner specified the constitutional basis for his request for review in setting the issues before the Cali-

fornia Supreme Court. In this Petition for Review, Petitioner simply *reiterated* the grounds asserted on innumerable occasions before the Committee of Bar Examiners at the several hearings before that Committee. [R. 30, 31, 33, 34, 35, 72, 76, 77, 80, 100, 103, 104, 109, 111, 113, 115, 117, 118, 120, 122, 126, 127.]

The Respondent filed an answer to this petition and denied generally and specifically the allegations in the paragraphs quoted above. (See Resp. Ans. p. 7.) By denying these grounds, Respondent *framed the issues* presented to the Supreme Court of the State of California. The issues thus framed clearly included the deprivation of the constitutional rights of the Petitioner under the First, Fifth and Fourtenth Amendments.

Thus Petitioner in the basic jurisdictional document before the Supreme Court of the State of California asserted the constitutional rights which he contended had been violated at the hearings below. These are basically the same constitutional points raised before this Court.

Now it is apparently asserted by the Respondent that because Petitioner did not thereafter cite the Constitution with regard to each and every point argued in his brief accompanying the Petition for Review[2], he has in some manner failed to preserve his rights.

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[2]Petitioner responds to argument by Respondent regarding the briefs below even though informed by the clerk of this Court that the briefs of parties in the Court below are not properly a part of the record.

This Court has frequently pointed out that no particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the State court with fair precision and in due time. (*People of State of New York Ex Rel. Bryant v. Zimmerman, et al.*, 278 U. S. 63, 49 S. Ct. 61; *St. Louis Iron Mountain & Southern Railway Co. v. Starbird*, 343 U. S. 592, 37 S. Ct. 462.)

It is thus the firm position of Petitioner that the constitutional contentions of the Petitioner were properly raised and protected by the specifications in the Petition alone; nevertheless, Respondent errs in contending that the Petitioner did not thereafter make adequate constitutional references in the brief which accompanied the petition.

It should be noted first that on pages 10, 11, 12, 13, 14, 15 and 16 of the brief filed by the Petitioner before the California Supreme Court, it was pointed out frequently and repeatedly that "applicant declined to answer questions, primarily on the ground that it was an invasion of his constitutional rights encompassed in the First Amendment to the Constitution" and that "it invaded the area of beliefs and opinions" and that "the Committee is not empowered to inquire into his personal beliefs or ideas in the political realm" and that "it was a violation of his rights under the First Amendment." Thus, repeatedly it was called to the attention of the Supreme Court of the State of California that the entire fundamental bottom position of the Petitioner was reliance upon the Bill of Rights of the Constitution. It is

impossible for one to read through these pages of Petitioner's Brief without having a full and clear understanding and recognition of the constitutional basis of the position asserted by the Petitioner.[3]

Then on pages 27 and 29 of his brief, Petitioner points out that the position of the State Bar in denying him the right to practice law, predicated on his alleged political beliefs or affiliations, was improper and thus clearly urged the same First and Fourteenth Amendment position to which he had referred earlier. Again on pages 30 and 33, the Petitioner refers to the dangers involved in establishing political tests for admission to the Bar. The point as argued here is identical with the point raised in the briefs before this Court. The argument in this brief clearly indicated to the Court that the fundamental error below had been the consideration of the political association and writings of Petitioner and that this was the basis upon which Petitioner was asking the Supreme Court of California to review the findings below. Sim-

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[3]It should be noted that in addition to the numerous references in Petitioner's brief, Respondents were fully cognizant of the constitutional issue before the State Supreme Court and made numerous references in its own brief to the assertion by Petitioner of his constitutional rights. Thus, on page 15 of Respondent's brief before the Supreme Court of California, Respondents stated that: "Throughout the hearings Petitioner urged a privilege under the First Amendment protecting him from committee questions concerning his associations and beliefs", and on page 34: "Petitioner, on the other hand, repeatedly urged a First Amendment privilege . . .", and finally in its *conclusion*, Respondents showed the importance of the constitutional questions by asserting on page 45 that: "In addition, Respondent has shown that its questions were proper, *that Petitioner had no constitutional privilege justifying his refusal to answer* and that an unfavorable inference was properly drawn from his silence . . ." (emphasis added). In view of these references, it would seem improper for Respondent to now suggest that the constitutional questions were not at all times before the Supreme Court of the State of California.

ilarly, the references on pages 37 and 40 clearly raise the entire issue of the lack of due process accorded the petitioner below.[4]

Thus it cannot be said that Petitioner failed to assert his constitutional grounds in his brief before the State Supreme Court.[5]

B. The Determination of the Supreme Court of California Was Necessarily Based Upon a Rejection of Claims Arising Under the Fourteenth Amendment.

1. THE ONLY EVIDENCE PRESENTED AGAINST PETITIONER RELATES TO HIS ALLEGED ASSOCIATIONS AND WRITINGS THUS MAKING IT NECESSARY FOR THE COURT BELOW TO DETERMINE THE CONSTITUTIONAL ISSUES ADVERSELY TO PETITIONER IN ORDER TO UPHOLD THE STATE BAR.

Respondent asserts that this Court's jurisdiction cannot be founded upon a mere surmise that the State Court's decision turned upon a federal question. Petitioner has no quarrel with the cases cited by Respondent in support of this point.

Petitioner disagrees, however, with Respondent's contention that he has failed to establish that the decision

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[4]Respondent argues that this could refer to the due process clause of the Constitution of California, rather than the due process clause of the Federal Constitution. This argument, however, must fail in view of the fact that the only reference to due process in direct language is found in paragraphs 10 and 11 of subsection (8) of the Petition for Review, and this reference is to the due process clause of the Federal Constitution and not of the State Constitution.

[5]See also Petitioners Reply brief before the California Supreme Court pages 3, 4, 5, 11, 13, and 16 where petitioner again sets the frame in which the State Court should consider this case as the right of the State to restrict membership in the State Bar by reason of beliefs, political writings, and associations.

of the Supreme Court was necessarily based upon a rejection of the claims arising under the Federal Constitution.

In support of its position, Respondent lists four points which Petitioner argued before the California Supreme Court. (Resp. Br. p. 28.)[6]

It cannot be assumed that these four points even as phrased were non-Federal grounds for the State Court decision; for, as we have pointed out elsewhere in this brief and in our opening brief, the State Court could not even begin to consider such matters as "Burden of Proof" or "force and violence," or "good moral character" as interpreted by Respondent, without examining the nature of the evidence submitted on these issues; the evidence relating to the associations of the Petitioner, the writings of the Petitioner,[7] and the public statements of the Petitioner.

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[6]1. Applicant sustained his burden of proving good moral character.

2. The burden of proof under Business and Professions Code Section 6064.1 falls upon the Committee of Bar Examiners not on the applicant.

3. If the burden of proof under Section 6064.1 is on the applicant, petitioner's evidence outweighed that of the Committee so that he sustained the burden of proof.

4. The Committee erred under its own rules by not advising petitioner of the evidence against him.

[7]It should be noted that while the Respondent alternately disclaims need to use these articles as a basis for its decision and then insists that they form a major basis for that decision—in its Answer to the Petition for Review in the Supreme Court of California, Respondent stated (p. 5):

> "Since these Exhibits (referring to the articles in the California Eagle, the testimony before the Tenney Committee and Bar registration forms) formed an integral part of the hearings and were given due consideration by the Committee in arriving at its decision, they are necessary to a complete consideration of this appeal."

This type of evidence was the sole evidence presented against the Petitioner in the hearings before the State Bar. If the testimony of the alleged associations of the Petitioner, the articles written by the Petitioner, and the testimony of the Petitioner before the Tenney Committee were to be eliminated from the record, there would be nothing in the record other than testimony attesting to the impeccable character of the Petitioner and his exemplary record of employment within the community and his lifetime of devoted work for his community.

How then could the Court below have affirmed the decision of the Committee of Bar Examiners without having first wrestled with and determined adversely to the Petitioner these issues of constitutional moment which are before this Court?

2. THE COURT BELOW WAS REQUIRED TO EVALUATE THE CONSTITUTIONAL SIGNIFICANCE OF THE NEWSPAPER WRITINGS OF PETITIONER.

Respondent then turns to the question asked by the Court regarding the matters referred to on pages 5 through 8 of Respondent's brief in opposition to the Petition for Writ of Certiorari. (Resp. Br. p. 29.) Respondent answers this query by suggesting that (1) since no objection was made to these articles, the issue of whether Petitioner's rights were infringed is not properly before the Court; and (2) that there was ample evidence to sustain the Supreme Court's decision without considering these articles.

As to the first point, it must first be noted that the constitutional rights embodied in the First Amendment cannot be waived in the manner in which Respondent suggests.

This is not a situation where the articles were part of a mass of evidence some of which was admissible and some not. Here the articles about which the constitutional question arises constitute the entire body of evidence introduced by Respondent on this point. If the articles were improperly introduced nothing remains. In such a case it cannot be said that he waived his rights from the mere fact that Petitioner failed to object at the precise moment the articles were introduced.

In addition, it should be noted that Petitioner appeared at this hearing on request by the Committee of Bar Examiners and at the moment that these documents were introduced, Petitioner was appearing without counsel and was asked questions regarding these articles without any indication that primary evidence upon which he would subsequently be denied admission to the Bar was being introduced into the record. Further, Committee rules specifically state that:[8]

> ". . . Neither the hearsay rule, nor any other technical rule of evidence, need be observed . . ." (Rule X, Sec. 101, Rules Regulating Admission to Practice Law in California.)

In view of its own rules, for the Respondent to now suggest that the failure to make a formal objection in accordance with technical rules of evidence constituted a

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[8]At page 47 of the transcript of record, when attorney for the Petitioner inquired regarding the rules for cross-examination, he was informed by the chairman that: "We are very informal, Mr. Mosk, and our rules say we don't have to pay much attention . . ." relating to that rule which does not require formal rules of evidence at the hearings.

waiver of a basic constitutional right is hardly consistent with a desire to meet head-on the issues before this Court.

Respondent's second answer to the Court's inquiry is that even if the Court found the consideration of the California Eagle articles to be a violation of the Petitioner's constitutional rights, there were still other independent grounds for denying Petitioner admission to the bar.

On page 30 of its brief, Respondent asserts that the uncontroverted testimony that Petitioner had been a member of the Communist Party was sufficient to support the determination that Petitioner had failed to establish his "good moral character" or that he did not "advocate the violent overthrow of government."

Yet on page 47 Respondent concedes that it does not now nor has it ever taken "the position that past membership in the Communist Party necessarily disqualifies an applicant from admission to the California Bar"; Apparently realizing that the record fails utterly to show any indication of any acts of wrongdoing by the Petitioner, Respondent on page 59 endeavors to show some evidence of advocacy of force and violence. But where does it turn for evidence of this "wrongdoing"? To the very California Eagle articles which it asserts are unnecessary to the finding of the California Court.[9]

It is thus abundantly clear that Respondent relies not on any one point but basically relies on two interrelated

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[9]See also page 15 for further reference to this point.

and inseparable grounds: the alleged political associations of the Petitioner and the writing of Petitioner in the California Eagle. A careful examination of Respondent's position indicates that if evidence on either of these points were removed from the record, Respondent's position would fail almost from its own admissions.

3. THE FACT THAT NO DECISION WAS WRITTEN BELOW DOES NOT DETRACT FROM NECESSARY CONCLUSION THAT CALIFORNIA COURT CONSIDERED THE CONSTITUTIONAL QUESTIONS.

Respondent refers to the fact that no decision was written below, and in some manner seems to draw the conclusion from the lack of a written decision that the Supreme Court below must have relied on some state ground. As a practical matter, however, the contrary must be true.

The only tenable conclusion available is that the Court below considered the evidence presented in the record. The only evidence contained in the record other than that favorable to Petitioner related to the alleged beliefs, associations, writings, and comments of Petitioner all in the field of opinion and politics.

When the California Supreme Court determined not to review this ruling of the Committee of Bar Examiners, it must necessarily have determined that Petitioner's constitutional rights were not offended by the consideration of these matters.

III.

Reply Argument.

A. Introduction.

Petitioner has now dealt with the jurisdictional problems as raised by the reply brief of the Respondent. While the discussion contained under this heading moved on occasion into the area of the merits of the case before this Court, it is now the intention of Petitioner to turn from these jurisdictional points to meet fully the issues on the merits as raised by Respondent.

It will first be noted that the refusal of Respondent to admit Petitioner to the Bar of California denied him his rights under the First Amendment to the Constitution. The Respondent asserts that it has the right to "select" who shall be admitted to the bar by proscribing otherwise legal political conduct and thought. To Petitioner, this assumption of right and authority by Respondent is constitutionally wrong because it encroaches on the basic rights of Petitioner under the First Amendment. This wrong becomes even more serious because of the nature of the practice of law and the vital needs of our society to maintain a free and independent bar.

Petitioner then points out that the position taken by Respondent violates his rights under the Fourteenth Amendment. This issue must be seen in the context of this record. Petitioner established affirmatively his good moral character; he denied his personal belief in, and offerred affirmative proof that, he abhorred doctrines of belief or advocacy of the use of force and violence. Only then

did Petitioner decline on principle to answer further questions relating to his associations, thoughts and writings, to require Petitioner to respond further in this area on the state of this record would place upon him an unreasonable and arbitrary burden which violates his rights under the Fourteenth Amendment.

B. The Denial Violated Petitioner's Rights Under the First Amendment.

1. THE FIRST AMENDMENT DOES NOT PERMIT THE STATE BAR TO SELECT ITS MEMBERS BY ESTABLISHING POLITICAL TESTS AS ITS CRITERIA FOR JUDGING PROSPECTIVE MEMBERS OF THE BAR.

Respondent, at page 35, asserts that the "primary responsibility for *selecting* the personnel of its bar rests with the State of California . . ." The emphasis which has been added by noting particularly the use of the term "selecting" lays bare the fundamental evil in the position of the Respondent herein and highlights clearly why the balance of the position taken by Respondent runs afoul of the protection of the First and Fourteenth Amendments.

To say that the State Bar may select one applicant as against another based upon agreement or disagreement with the ideas or ideals of the individuals is to give to the State Bar a right not permitted under the Constitution of the United States.

This evil is compounded when we find the State Bar selecting isolated phrases from articles written by Petitioner and holding them up to the white light of historical perspective to determine whether the articles conform to the Committee members' present understanding of or

orientation toward world events of five years earlier. On page 59 of its brief, we find Respondent saying:

> "In addition it may be noted that his California Eagle articles also provide some direct evidence that he was sympathetic to and probably advocated the violent overthrow of the government—*e.g.*, the article set forth at page 213 *et seq.* of the record where he declared that loyalty to America meant militant (which Webster defines as engaged in warfare, fighting, etc.) support of the principles of the Constitution as Petitioner defined them. We feel that it is fair to surmise from Petitioner's articles and activities that his definitions of these principles are in close accord with those of the Communist Party."

By what right or authority may the Respondent herein by "surmise" set up the standards of what does and what does not "accord with (the ideas) of the Communist Party"?[10] By what type of upended logic does a sentence stating that a person believes in the "militant support of the principles of the Constitution" become proof that he supports the violent overthrow of that Constitution? The lack of logic in this interpretation only emphasizes the basic evil in allowing any governmental body to have the authority to examine and judge the "moral worth" of any political or social writings.

It is not the purpose of the Petitioner in this brief to argue the truth or falsity, the correctness or the error, in any or all of the articles written by Petitioner. It is only our purpose here to show that the logical conclusion

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[10]When the State Bar so interprets the State Bar Act it violates the rights of freedom of speech and press as safeguarded under the due process clause of the Fourteenth Amendment. (*De Jonge v. Oregon*, 229 U. S. 353; *Hebert v. Louisiana*, 272 U. S. 312.)

of Respondent's position is to deny Petitioner admission to the Bar by reason of the subjective personal interpretations of the articles by the members of the State Bar, or even of the Supreme Court of the State of California.

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary." (Mr. Justice Brandeis in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 375.)

2. THE SANCTITY OF THE FIRST AMENDMENT IS OF EVEN GREATER IMPORTANCE IN THIS CASE BECAUSE OF OUR SOCIETAL REQUIREMENT OF A FREE AND INDEPENDENT BAR.

Much has been said by Respondent in the course of these proceedings regarding the right of the State to set qualifications for the practice of law. It has cited *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716; *Adler v. Board of Education*, 342 U. S. 485; *Orloff v. Willoughby*, 345 U. S. 83; *American Communications Association v. Douds*, 339 U. S. 382; *Gerende v. Board of Supervisors*, 341 U. S. 56; *Black v. Cutter Laboratories*, 351 U. S. 292; *Steinmetz v. California State Board of Education*, 44 Cal. 2d 816, Cert. denied 351 U. S. 915 in support of its position.

By citing these cases, Respondent would seem to equate the rights of teacher employees of public schools systems, employees in private industry, or draftees in the army with the rights of practitioners of the law. In a sense, it is ironic that it should fall upon the Petitioner—an applicant for admission into the great tradition of the law—to speak of this tradition, its meaning and its application.

No profession has higher traditions, a more glorious past, and a more just cause for pride in its accomplishments.[11] When we examine the basis for this pride we find that it is founded on fearless, unceasing and uncompromising leadership in protecting the rights of all citizens of our society which the legal profession has provided.

This tradition even antedated Thomas Erskine, who proclaimed in his famous defense of Thomas Paine that:

> "I will forever, and at all hazards assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court . . . . from that moment the liberties of England are at an end." (Lloyd Paul Striker, For the Defense, Doubleday & Co., N. Y. 1947.)

And this great tradition was pridefully maintained through the actions of Charles Evan Hughes, defending Socialists in the State of New York, and Wendell Willkie in defending an American Communist leader before this very Court, despite the unpopularity of the causes and the danger to their personal popularity as leaders of major political parties.

The lawyer is not the servant of the state in the sense of the school teacher; nor must he follow the instructions of his employer like a private employee; nor is he part of

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[11] "Just as the lawyers of 1790 to 1840 took a leading part in fashioning the Country's ideals to suit political change, so we must now shoulder the task of relating them to business and economic change." Mr. Justice Stone quoted in Mason, *Harlan Fiske Stone*, Viking, New York, 1956, page 381.

a military unit which depends for its success on the unquestioning obedience of its individual components.

The lawyer is not any of these things. He is a member of a profession vested with the responsibility of protecting the individual against his society, and, at the same time, of protecting through the courts that society against the individual. The lawyer formulates the laws by which our society functions, assumes the responsibility for enforcing these laws; and if those laws or rulings violate the fundamental precepts of our society, it is the lawyer who assumes the initiative to invalidate those laws. Indeed he does play a unique role in our society.

When we allow the State Bar to *select* its "personnel for the Bar" in the manner which the State Bar of California suggests it must do at page 53 of its brief, we are allowing that organ of the State to choose which political attitudes are acceptable for lawyers, and what groups may be eliminated from the legal profession[12] we thereby destroy the foundation stone of the structure maintaining this unique position of the lawyer in our society. For if some prospective lawyers are to be eliminated by reason of their political beliefs and associations, the free play of ideas required for a truly free and independent bar will have been destroyed.[13]

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[12]This is indeed what Respondent here seeks to do; for it doesn't stop with denying Petitioner admission to the bar but suggests that if Petitioner were a lawyer, he should be disbarred for writing the articles contained in the record.

[13]"The profession of law because of its public and political character, must not be allowed to become the monopoly of any social or economic class." (Mr. Justice Stone, quoted in Harlan Fiske Stone by Alpheus Thomas Mason, Viking Press, New York. 1956, page 95.)

An analogy to this effort to restrict the membership of the Bar to persons of conformist political views has had its counterpart in the matter of the selection of persons from within the Bar to serve on the highest court of our land, this Supreme Court.

Perhaps, no more striking example can be found than the efforts to prevent the ratification of the appointment of Mr. Justice Brandeis, as a member of this very Court.

The Boston Morning Globe, on January 31, 1915, summed up the case against Mr. Justice Brandeis' appointment to the Supreme Court in the following language:

> "That Mr. Brandeis is a radical, a theorist, impractical with strong socialistic tendencies.
>
> "That he is given to extravagance in utterance, inspired by prejudice and intolerance.
>
> "That he is a 'self-advertiser,' reckless in his methods of seeking personal exploitation.
>
> "That he does not possess the 'judicial temperament' that would fit him for the duties of the Supreme Court Judge, in that he would be influenced by personal considerations rather than the merits of the cases submitted for impartial analysis and exact judgment."[14] (Alpheus Thomas Mason's "Brandeis,

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[14]One shudders to think what the Committee of Bar Examiners in California would have done to a Thomas Jefferson and the signers of the Declaration of Independence, who said that ". . . . whenever any form of government becomes destructive of these ends it is the right of the people to alter or abolish it." if they had sought admission to the California Bar.

Similarly, when Roger B. Taney came up for confirmation as a Associate Justice of the Supreme Court, The Boston Columbian Sentinal said Feb. 11, 1835 that: "The Senate will not only apply the veto to the pretensions of this man, but that it will pass a decided resolution to oppose the elevation of any man who is not perfectly sound in regard to the fundamental principles of the Constitution, as expounded by Daniel Webster." (Roger B. Taney by Carl Brent Swisher, McMillan, New York, 1935, page 312.)

a Free Man's Life," Viking Press, New York, 1946, p. 469.)

The similiarity of phraseology becomes even more startling when one notes the Respondent's suggestion on page 50 that the statements and articles by the Petitioner would be grounds to disbar him were he already a lawyer.

There is little that one can add to the comment of Mr. Justice Brandeis himself in discussing the attacks upon him in a letter addressed to Judge Charles F. Amidon:

> "No one but a fanatic can be sure that his opinions —political, economic or social—are correct, but no man, be he reactionary or progressive, ought to doubt that free thought and free speech are necessary in a democracy, and that their exercise in things public should be encouraged. My opponents throughout long years practically refuse to discuss publicly or privately with me the measures under consideration. For opposing arguments, they substituted attacks upon reputation, and the community permitted them to do so almost without a protest. This seems to me the fundamental defect. Our task in Massachusetts is to reconstruct manhood." (Alpheus Thomas Mason's "Brandeis, A Free Man's Life," Viking Press, New York, 1946, p. 676.)

Where can the line be drawn if the principles urged by the State Bar are to prevail? Whose judgment is to be accepted? Whose principles of today are so certain, so sure, so timeless in their fundamental truth that he can risk preventing admission to the Bar to one who disagrees in whole or in part? Will not our effort to exclude

the unorthodox thinker of today result in a sterile bar of tomorrow?[14a]

This Court is not called upon to determine whether the opinions expressed, the associations sought, or the ideas printed by the Petitioner in this case are good or bad, true or false, whether they stand the test of time, or whether the movement of history had shown them to be fallacious.[15] The issue is whether the American Bar and American democracy can survive the establishment of a principle which gives to any group in any State at any time the right to *select* which political ideas, which political associations, which political doctrines are acceptable, and which forbidden, for one seeking admission to the Bar.

It is submitted that the history of the Bar cries out against restrictions based on ideas or associations. Good moral character is not and cannot be determined by one's political ideals or associations.[16]

[14a]"Serious administrative difficulties arise in deciding where to draw the line in cases where it is attempted to deny a candidate admission to the Bar on the basis of political thoughts or affiliations or because of refusal to answer political inquiries. It is difficult to see how such elusive concepts as disloyal or doubtful loyalty can be used as a basis for denying admittance to the Bar." "The Illinois Bar and Individual Freedom," 50 Northwestern University Law Review 94, 103 (1955).

[15]"The preliminary freedom by virtue of the very reason for its existence does not depend as this Court has said, on proof of truth," *Near v. Minnesota*, 283 U. S. 697; *Patterson v. Colorado*, 205 U. S. 454.

[16]Petitioner pointed out in his opening brief (pp. 36 and 44-48) that there is no reasonable relationship between the political inquiries of Respondent and the type of moral character properly required for the practice of law. Respondent appears to respond to this point by asserting that the question as to membership in

3. The Respondent Equates Its Subjective Disagreement With the Contents of Articles With Evidence of Bad Moral Character.

Not only has Respondent moved into the area of attempting to select its members of the Bar by examining the political content and historical accuracy of their writings or the correctness of their thinking—or the wisdom of their associations—but Respondent has gone one step further. Respondent asserts that it has weighed the contents of the articles written by the Petitioner and has found the contents wanting.

At page 50 of the Respondent's brief, after examining the rules and duties of an attorney under the State Bar Act of California, Respondent has said that if the statements made by Petitioner were made by an attorney, they would become a basis for disbarment. Petitioner is not arguing such a case at this time but suggests that an effort to disbar an attorney by reason of such articles written in a newspaper would meet substantial constitu-

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the Communist Party is relevant to the issues here. Without rearguing at this point the issue of relevancy since it has been covered elsewhere, petitioner points out that mere relevancy alone is not sufficient to justify the questions asked by Respondent.

There are numerous matters relevant to cases before trial courts which may never be admitted before either judge or jury. Matters falling within the protection of the husband-wife, confessor-confessant and lawyer-client relationships are often most highly relevant to issues. Yet, in all of these and numerous other matters, high public policy considerations have determined that we must sacrifice the value of the relevant testimony in order to protect higher values of basic importance to society. Thus in this case, even if questions in this area were held to be relevant, they would still be improper because they fall within the prohibitions arising from societal policy considerations based upon the First and Fourteenth amendments.

tional objections. Nevertheless, it is important to examine the significance of this position of the State Bar at this point.

Now for the first time in these proceedings, Respondent is no longer asserting the "reasonable" position which it has endeavored to uphold in other proceedings relating to this case. Respondent no longer suggests that Petitioner had a *right* to write these articles or make these statements,[17] but now suggests that these articles show bad moral character. Respondent is no longer standing on its position that there was a simple failure to meet the burden of proof of good moral character, but rather suggests that the writing of these articles[18] is sufficient to establish affirmatively bad moral character.

The danger involved in opening the gates to this type of interpretative reading by the Committee of Bar Examiners is magnified by its own selection from the writings. As has been noted heretofore, Respondent has selected the word "militant"[19] as proof of belief in force and violence even though this word is joined to Petitioner's affirmance of his support of the principles of the Constitution.

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[17]But see page 51 where Respondent somewhat inconsistently (and reluctantly) concedes the right to publish these articles and admits that Petitioner cannot be punished for writing them.

[18]Perhaps coupled with the other evidence, although even Respondent's belief in the necessity for this additional evidence is not clear in the discussion on pages 49 and 50 of its brief.

[19]See page 15 of this brief.

When thus revealed, it becomes clear that to allow the State Bar to use newspaper articles of political opinion as a basis for showing bad moral character can and does lead to an arbitrary and unreasonable determination violative of the First and Fourteenth Amendments.[20]

4. THE STANDARD ERECTED BY RESPONDENTS IS AN ABRIDGEMENT OF FREEDOM OF SPEECH, OF THE PRESS, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

Chiefly before, and then on fewer occasions after, his commencement of the study of law, Petitioner, in the role of newspaperman, wrote and published articles editorializing upon world affairs in the area of political decisions.

Respondents during the hearings presented Petitioner with some twenty-one of these published expressions of opinion (Resp. Br. p. 5) from which they have selected, as typical of these editorial expressions of opinions several quotations from this material for inclusion in their brief at pages 8 to 12.

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[20]Ira Michael Heyman, in his Yale Law Journal article in Volume 65, pages 879-80 (May 1956) points out that:

> "But if safeguarding the reputation of the Bar were expanded to require attorney conformity to varying community standards of personal belief in decorum, the individual bar examiner would have a practically unlimited discretion to deny admission on subjective grounds. Undoubtedly requiring a candidate for admission to show that his character satisfies the ethical standards of the profession is as justified as requiring him to demonstrate his professional learning, but the purpose of the requirement is one of qualification, not one of punishment. The analogy to the requirement of professional learning itself implies that good moral character must be determined by objective criteria designed to test the capacities required by the practice of law."

Respondents assert that these published opinions reflected Petitioner's deficient moral standards (Resp. Br. p. 17), to which they state they gave serious consideration as being relevant to his moral character (Resp. Br. p. 33); as a relevant and proper area of inquiry (Resp. Br. p. 40, footnote); as evidence indicating his standard of truth, honesty and general morality were such that he could not be considered a person of good, moral character (Resp. Br. p. 42); as directly suggesting that Petitioner was not a person of good, moral character (Resp. Br. p. 49); and as examples of repeated violent attacks on the character and integrity of the courts and other responsible persons by patently incorrect statements made without supporting evidence and with indifference to their truth or falsehood (Resp. Br. p. 49); and as grounds for disbarment if made as an attorney. (Resp. Br. p. 50.)

Moreover, so Respondents argue, although given an opportunity to do so, Petitioner failed, or refused to show his evidence supporting his published charges and likewise refused or failed to show that his current standards became nobler than the criteria he used as a newspaperman, inferred by Respondents to be debased. [Resp. Br. p. 50.)

Respondents, furthermore, argued that since these published editorial opinions expressed Petitioner's moral standards as a newspaperman, they are relevant to the determination of his good moral character as a candidate for admission to the bar; and whether they were made without evidence to support them, Respondents contend, is relevant to reflect his standards today. (Resp. Br. p. 50.)

While conceding Petitioner's constitutional right to publish this material and its immunity from preventive in-

junction, or subsequent punishment, Respondents urge that there is no constitutional bar to the consideration of the "evidence" contained in the noted editorial expressions (Resp. Br. p. 53) and that reasonable doubt (and "suspicions") (Resp. Br. p. 57) that Petitioner was a person of good, moral character thereby arose among other sources, from this "evidence."

But to reach these conclusions, the State Bar must examine each article perhaps sentence by sentence and paragraph by paragraph to determine the meaning thereof.

> "The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications . . . is significant of the deep-seated conviction that such restraints would violate constitutional right" (*Near v. Minnesota,* 283 U. S. 697).

Yet the effort by Respondents here to weigh and judge publications is nothing less than an effort to place a prior restraint on the political writings of potential members of the bar. For what aspirant to the Bar would dare write anything controversial for fear that the writing may not measure up to some future standard of fairness, reasonableness, or responsibility as arbitrarily established by a future committee of Bar Examiners?

Thus exposed to the light of reason, this position of Respondents amounts to the modest claim on its part that Respondent State Bar, a public corporation (Calif. B. & P. C. 6001) acting as the administrative arm of the Supreme Court of California, purports, through its Respondent committee of bar examiners, without statutory support, to assume the right, even duty, to make a "law" abridging freedom of the press, speech, and the right to petition the government for a redress of grievances. The

limitless ambit of this claim is particularly disconcerting when made after passing acknowledgement of the rights guaranteed by the First Amendment. The strictures thus attempted to be impressed on Petitioner are, moreover, expressed only in the *ad hoc* determinations of Respondent committee, cut to fit the case before it at the particular time of its presentation, without even the formality of published regulations upon the object. Petitioner ventures to say that if the criteria here used by Respondents in judging his moral quality as a candidate for the bar were formulated in writing that the transgression of the First Amendment would be ludicrously palpable.

C. Petitioner Was Denied Due Process of Law Contrary to the Fourteenth Amendment by Arbitrary and Unreasonable Administration Below of Burden of Proof in a Manner Violating Individual Rights and the Security of Personal Conscience of Petitioner.

The Respondent has conceded (Resp. Br. p. 35) that the practice of law is a right and may not be dismissed as merely a privilege, thus reducing the question at bar in Constitutional terms to whether or not such right has been arbitrarily and unreasonably interfered with or abridged in the action below. Petitioner urges such abridgement has occurred, and in grevious measure, and that the abridgement is particularly to be condemned because it occurs within the area of the First Amendment and threatens the independence of the bar.

Concededly California procedure places the burden of proof of good moral character upon applicants in proceedings to qualify for the practice of law. Petitioner makes no quarrel with such procedure when normally applied. In the proceedings below Petitioner discharged such burden in every respect and particularly which could

reasonably be asked of him, in the absence of the State's moving forward in some affirmative manner. To resolve the matter below against Petitioner for his failure to further respond to questions probing privacy of political opinion and association—in premises declared on oath to violate personal principle and conscience, and abridging at the core the liberties of the First Amendment—as was done below, constituted arbitrary governmental action denying due process of law.[20a]

Petitioner concededly met and discharged every aspect of the burden of proof respecting his possession of good moral character, save for declining out of principle to answer questions respecting solely political opinion and association. This area was narrowed and confined exclusively to the protected domain of the First Amendment by Petitioner's categorical declaration under oath that he did not, never had and never would in any form or manner advocate or believe in force and violence.

In all respects save belief, advocacy and association his full moral character and fitness was undisputed, and his record and qualifications exemplary. And as to negativing possible proscribable advocacy or association, Petitioner more than fairly met all reasonable burden of demonstrating such negative: *first*, by utterly and totally disavowing and denying any such advocacy on his part,

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[20a] In support of this general proposition on somewhat similar facts is the recent lower court case, *Coleman v. Watts* (Florida Supreme Court, May 11, 1955), 81 So. 2d 650 where the court concluded:

> "Although the burden is always upon the applicant to 'satisfy the Board of his or her moral standing', we have the view that when he has made the *prima facie* showing required by the statutes and rules governing admission to practice, 'it is incumbent upon those making objections to offer evidence to support the same and to overcome the *prima facie* showing made by the applicant.' . . ."

direct or indirect, in any form or manner;[21] *second,* by producing (by fortunate chance) antecedent written expressions on his part condemning and disavowing such advocacy at a time when foreknowledge of these proceedings was impossible;[22] and *thirdly,* by introducing an impressive body of letters from prominent members of his community long and well acquainted with him attesting to the character attributes normally associated with the practice of law and establishing the genuine conviction of the signers that Petitioner is not and could not be a believer in or an advocate of force and violence.[23]

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[21]"I am answering I never did, I do not and I never would advocate the overthrow of the government by force or violence. I do believe like leaders like Jefferson people should have the right through discussion, ballot, the minority view becomes the majority view, that changes like that are sought through the ballot box but never through force and violence. That I do not believe. I think my whole experience has shown that." [R. 37.]

[22]See pages 1-2 of this brief.

[23]If there was any indication that Petitioner believed, advocated or practiced overthrow of the government by force and violence, would a character reference say:

"I recommend Mr. Konigsberg as a person of high moral principle and character." [R. 290.]

or

"There is no question or doubt in my mind that he is of good moral character. . . ." [R. 292.]

or

". . . I have never heard him make a statement that would make me feel that he was not a man of strong character and a believer of democracy and the American idea." [R. 295.]

or

"(he) has impressed me as a man representing the finest ideals of Americanism . . ." [R. 305.]

or

". . . a person of exemplary character, genuine honesty and integrity . . ." [R. 306.]

or

"He indicated to me an open-mindedness seemingly inconsistent with any calculated disregard of his duty as a loyal and conscientious citizen . . ." [R. 312.]

So doing Petitioner discharged all burden reasonably to be exacted from him. He stopped solely at the point of declining to volunteer declarations, or to answer questions concerning his present thoughts, opinions or associations,[24] after categorical and total disavowal by him of advocacy or belief in force and violence in any connection, manner or form. In such premises to continue upon him a burden to proceed further or answer constituted arbitrary governmental action disregardful of principle, reason and constitutional right, and violating due process of law.

At the core of the narrow issue presented here for resolution is not burden of proof, truly, but responsibility to go forward. In going to the point he did in denying advocacy or belief in force and violence respecting his thoughts and political associations Petitioner accounted to the limit to which he Constitutionally could be pressed as to such subjects, and fairly and truly marked on his

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[24]It should be noted that petitioner did respond to some questions regarding his beliefs. At page 40 of the transcript we find the following colloquy between members of the committee and petitioner:

"Mr. Preston: I deliberately did not. The first question we discussed at length is, 'Are you a Communist'?

A. I will say no, definitely no. The only thing I would describe myself very simply as one who has read a lot, studied a lot, because as a teacher of history and political education in the Army I believe strongly in the fundamental concepts of our democratic system.

Mr. Preston: Your answer that you gave was directed to the question, 'Are you a member of the Communist Party?'

A. Yes, and solely to that. If you want a categorical answer to 'Are you a communist?' the answer is no.

Mr. Preston: You gave us that.

Mr. Sterling: That is your answer.

A. (By the Witness): No.

Mr. Black: Would you care to state whether you have ever been a Communist?

part—and under oath—the line of non-protected thoughts, engagements or utterances under the Constitution. He stopped solely at the boundary line of speech and association nurtured and protected utterly by the Bill of Rights. At that point the State had neither right nor power to press him further to speak—at least not without laying greater, or different, foundation than laid below, if any such foundation existed. Petitioner had proceeded to the outer point to which mere inquiring interrogatories, absent evidentiary foundation grounded in individual scienter, could press him to advance.

For the State to require Petitioner to speak further in this constitutionally protected area, it was incumbent upon the State to produce some evidence of wrongdoing requiring further comment or response from Petitioner. To hold otherwise would grant an unrestricted right of interrogation to the Respondent and place upon Petitioner

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A. Do you mean by that as he is making the distinction philosophically or a member of the Communist Party?

Mr. Black: I mean in the same sense you have just answered that you are not now a Communist.

A. I would say my thinking has only been what I described a moment ago as being based on the elementary concepts of the American democracy, assuming that you mean do I think like a Communist; that is assuming we have some common understanding what you mean by that term.

Mr. Sterling: We are not talking now about a membership in any party.

A. Yes, philosophical views."

Having responded in this manner at the first hearing, petitioner at the second hearing indicated that if he was asked the same question again, he would decline to answer it on the same principle upon which he had declined to answer the other questions. [R. 76-78.] Petitioner thus emphasized that his position at all times was a principled one and that he was declining to answer solely because as a matter of principle he believed the committee did not have the right to inquire into his beliefs or associations and that this principle was protected by the First and Fourteenth amendments.

the burden of exposing his entire life, laying bare his every thought or deed, and stripping himself of all privacy in order to affirmatively establish to the subjective satisfaction of the Respondent that he was a person of good moral character.

It is critical to remember that Petitioner declined to speak or proceed further than he did not out of guilt or wrongdoing but *out of principle.* He averred under oath that he did not in any form or manner advocate or believe in force and violence against government. Beyond that he declared on oath he was barred by compelling conviction of duty as a citizen and by moral conscience from rendering any disclosure or accounting unto government as to what he did nor did not believe in or advocate, or as to what had or had not been his political association. As to such matters he was foresworn by moral conscience and conviction from disclosure and accounting to government even as he would be foresworn to silence as to the manner of exercise of his right of ballot.[25]

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[25]Petitioner stated in part below:

> "A. I understand that. I can only say what I said several times already. Under those circumstances the constitutional guarantee of free speech means nothing, if it doesn't mean you can keep your views to yourself, and certainly lawyers recognize that and should be among the first to defend that right. I think the legal profession, particularly the leaders of the legal profession should be the first to insist on it. Put another way, of what meaning is any constitutional guarantee if it becomes a crime to invoke that guarantee?
>
> . . . And as I have indicated before, this is such a profound matter of principle with me that no matter what the price is I cannot give it up."

Petitioner further said:

> "Now, I don't think the Committee wishes me to labor that point, though I think I have an adequate legal basis for the

Petitioner does not assert that rights under the First Amendement are absolute, but certainly political speech and association not connected to advocacy of force and violence is privileged and free in Constitutional law, and is shielded and immunized against governmental restraints and abridgements. This granted, defense of such area of liberty of speech, and upholding of the same against governmental acts of interference and intrusion, including coerced accountings or disclosures, is, or at very least may honestly and reasonably be conceived to be, not merely the right but the abiding moral and Constitutional *duty* of citizens dedicated to Constitutional government. Yet it is for assertion of just such conviction of moral and constitutional duty that Petitioner below was disqualified from the bar. This is arbitrary and unreasonable governmental action, and in Constitutional terms is a denial of due process of law.

It constitutes a totally arbitrary inferring of nonmorality from proof of morality; finding bad moral character from evidence and acts demonstrating highest moral integrity. For the State to seek to coerce Petitioner on pain

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position I am taking, and I referred the Committee previously to a comparable historical period in our history, the Alien and Sedition Laws, in which, all of which that is, our American history shows that it is a very grave and a very solemn duty of a person who believes in these principles to defend them, to use them and not to give way.

And one of the other quotations I have shows that there is nothing in our constitutional history that says in periods of stress must you give up these rights. Particularly in periods of stress you should not give up these rights. I know the members of this Committee are far more familiar with this than I. I am familiar with the environment and the circumstances this Committee has to operate under. I am aware of what are my duties as a citizen."

—R. A. pp. 49-50 and 113-114.

of denial of right to practice law to abandon and betray expressed moral conviction presents the anomalous spectacle of the State, in a "morality" inquiry, proposing avowedly to destroy and ride down moral integrity, not to inquire into or nurture such. Thus the State pursues and prizes subservience, not manliness; weakness, not moral strength and dedication. So to act is to act at war with the asserted end of seeking character fitness for the practice of law and constitutes arbitrary action violating reason and due process.

Moreover, the disregard and violation of conscience below is particularly critical because occurring not in an area of purely private concern but in an area affecting and treating of free political speech and association, and this in premises affecting deeply the existence and continued wellbeing of a free and independent bar.

Absent advocacy of force and violence the fullest freedom of speech and association, even for "Communists" (*U. S. v. Dennis,* 341 U. S. 494; *De Jonge v. Oregon,* 299 U. S. 353), is an "imperative" of the Constitution, because constituting "the very foundation of constitutional government." (*De Jonge v. Oregon, supra,* at p. 365.) "Communists, we may assume, carry on legitimate political activities." *A. C. A. v. Douds,* 339 U. S. 382, 393), and as to all groups and associations scienter of proscribed or proscribable utterances is crucial in judging any individual member or adherent, for programs of groups can be different in content to different men, and much that is protected and even of highest Constitutional value may attend also the advocacy of groups asserted in other regards to espouse illegal advocacy of force and violence. (*Wieman v. Updegraff,* 344 U. S. 183; *Schneiderman v. United States,* 320 U. S. 118; *Bridges v. Wixon,* 326

U. S. 135.) Under the Constitution even the speech of the Communist Party proper, absent the subject of force and violence is free and protected, to be guarded, in the words of this Court, because of "[its] societal value" with "scrupulous care." (*Dennis v. United States*, 341 U. S. 494, 503, 516.) And *a fortiori* what is protected and rendered shielded and secure for the Communist Party is rendered no less so for persons who on grounds of conscience and Constitutional principles refuse to acknowledge or accede to claim of power by government to compel disclosure as to such or any other political association by individuals.

Moreover, within the premises of a free and independent bar the upholding of conviction and conscience as to the great Constitutional liberties of thought, speech and association is particularly crucial and important. A subservient bar can only make for a subservient people, and, in the end, for a subservient Constitution. The faith of the nation, which it is the special obligation of an independent bar to express, defend and exemplify, lies not in subservience to government but in jealous assertion of independence, manliness and liberty. The nation's faith is that of Madison's "Remonstrance," and the historic admonition therein that:

> "[Governments] are but the creatures and vice-regents of the [people]. Their jurisdiction is both derivative and limited: It is limited with regard to co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the

people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The people who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves."

Madison's, "Memorial and Remonstrance," quoted in 330 U. S. 63, 65.

Respectfully submitted,

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January 8, 1957.